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# United States Senate

WASHINGTON, DC 20510-2309

July 17, 2017

Federal Communications Commission
445 12th St SW
Washington, DC 20536

RE: WC Docket No. 17-108

Dear Chairman Pai, Commissioner Clyburn, and Commissioner O'Rielly:

In response to the request for comments in the Notice of Proposed Rulemaking In the Matter of Restoring Internet Freedom, I am writing to oppose the Federal Communications Commission's (FCC) proposal to reverse the Open Internet Order of 2015 and dismantle the internet as we know it.

Two and a half years ago, American consumers and businesses celebrated the FCC's landmark vote to preserve a free and open internet by reclassifying broadband providers as common carriers under Title II of the Communications Act. The vote to enact the Open Internet Order came after the FCC received nearly four million public comments, the majority of which supported strong net neutrality rules, making it the most commented-on issue in the history of the agency. While this outpouring of support is notable, the substance of these comments also built the important case for why reclassification was necessary and why net neutrality, more broadly, is so critical. Consumers urged the Commission to protect their unfettered and affordable access to content; a wide range of advocacy organizations pressed the Commission to ensure that broadband providers couldn't pick and choose which voices and ideas would actually reach consumers; and small and large businesses alike asked that the internet remain an open marketplace where everyone can participate on equal footing. The FCC responded by establishing rules that are strong, clear, and enforceable.

Now, the FCC is proposing to reverse the Open Internet Order and remove Internet Service Providers (ISPs) from Title II classification, scrapping the most appropriate, court-tested framework for strong net neutrality rules. I urge the FCC to protect the open internet by maintaining Title II classification of ISPs, preserving and fully enforcing bright-line rules against throttling, blocking, and paid prioritization, and securing the free flow of ideas over the internet.

## I. Title II is the most appropriate regulatory framework for the internet and the FCC's only option to establish strong net neutrality rules.

Title II is the most appropriate regulatory classification for the internet. It treats broadband as the telecommunications service that it is and provides the FCC with the necessary legal authority to establish and enforce critical net neutrality rules. The common carriage principles codified in Title II have been a cornerstone of federal communications law since the 1930s. Telephone services have been subject to common carrier rules for the past eight decades, to the great benefit of consumers and citizens. These rules did not prevent the telephone industry from becoming a

highly profitable part of the American economy—an important reminder that protecting the public interest and promoting economic development are not mutually exclusive goals.

Indeed, there is no evidence that investment in broadband infrastructure has suffered in the years since ISPs were reclassified as common carriers under Title II. In a report issued in May, Free Press found that not a single publicly traded U.S. ISP had reported any losses that were blamed on Title II classification to its investors or regulators.[1] In fact, the report provided several examples of ISPs admitting that Title II had not affected business at all.[2] And just today, the Internet Association released its own report finding that "there is no evidence of any harms as a result of net neutrality rules. Rather, [net neutrality] has allowed for success in both the telecommunication sector and edge services.[3] Free Press and the Internet Association have proved what net neutrality supporters have argued for a long time—Title II classification does not mean heavy-handed regulation that puts the federal government at the center of the internet. Instead, it simply ensures that the FCC is empowered to prohibit unjust or unreasonable discriminatory conduct by ISPs, thereby protecting businesses and consumers alike and preserving the internet as a platform for the exchange of ideas and information. Beyond that, the FCC's forbearance authority allows the agency to refrain from imposing other aspects of Title II that aren't necessary to preserve an open internet.

Finally, and perhaps most importantly, Title II classification is the only legal authority by which the FCC can establish strong net neutrality rules. In 2014, in *Verizon v. FCC*, the D.C. Circuit rejected the core of the FCC's 2010 attempt at preserving an open internet, holding that the FCC could not regulate ISPs as if they were common carriers without reclassifying them as such, thus providing the FCC with a clear roadmap for the Open Internet Order and Title II reclassification. In 2016, the D.C. Circuit upheld the Open Internet Order of 2015 in full, citing the previous lawsuit and the FCC's failure to reclassify broadband as a telecommunications service: "The Commission overcame this problem in the Order by reclassifying broadband service — and the interconnection arrangements necessary to provide it — as a telecommunications service."[4]

## II. Bright-line rules against blocking, throttling, and paid-prioritization are vital to preserving an open internet.

The core of the 2015 Open Internet Order is the set of bright-line rules it establishes to prevent ISPs from picking and choosing which content is accessible online. These simple prohibitions against blocking, throttling, and paid prioritization ensure that internet users can access all lawful content on the internet without any interference from their ISP. As a result, businesses large and small can compete on a level playing field, and every voice on the internet has a meaningful outlet.

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[1] S. DEREK TURNER, IT'S WORKING: HOW THE INTERNET ACCESS AND ONLINE VIDEO MARKETS ARE THRIVING IN THE TITLE II ERA 3–5 (Free Press 2017).

[2] *See, e.g., Id.* at 68 (In an interview, Comcast CEO Mike Cavanagh states in response to a question regarding Title II classification's impact that "I think in terms of what actually happens . . . it's the fear of what Title II could have meant, more than what it actually did mean."); *Id.* at 76 (In a speech to investors, Charter CEO Tom Rutledge stated that "Title II, it didn't really hurt us, it hasn't hurt us.").

[3] CHRISTOPHER HOOTON, PH.D., AN EMPIRICAL INVESTIGATION OF THE IMPACTS OF NET NEUTRALITY 3 (Internet Association 2017).

[4] *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 713 (D.C. Cir. 2016).

Without the prohibitions against blocking, throttling, and paid prioritization, ISPs will be free to discriminate against, or in favor of, particular content, applications, or services online by blocking, slowing down, or otherwise interfering with consumers' access to lawful content. With respect to paid prioritization, the FCC has explained that it could result in a well-functioning internet for those wealthy enough to afford it and a congested, low-quality internet for everyone else.[5] Paid prioritization would also create new costs for consumers. As companies pay ISPs for priority treatment, those companies will undoubtedly pass along such costs to consumers in the form of higher subscription fees or product prices. Other companies that are unable to pay the fee would be unable to compete vigorously as a result. Facing reduced competitive pressures, well-funded, established corporations could leverage their market position in the form of higher prices. Notably, the threat of paid prioritization is not just theoretical—certain ISPs have admitted a desire to negotiate pay-for-priority deals with edge providers.[6]

The internet is not just a marketplace for goods and services—it also is a robust marketplace of ideas, and the prohibitions against throttling, blocking, and paid prioritization ensure that users can access a wide range of viewpoints. Without these rules, a handful of multibillion-dollar companies would control where their users get their information and could choose to bury sites offering alternative viewpoints if the content producers were unable to play by their rules. Paid prioritization would enable the ISPs to amplify the voices of those with the deepest pockets, while quieting—if not silencing—everyone else.

## III. The Open Internet Order is necessary to protect Americans' access to diverse information sources and to ensure that the internet remains a platform for public discourse.

I maintain that preserving an open internet is the First Amendment issue of our time. Allowing giant corporations to pick and choose the content available to everyday Americans would threaten the basic principles of our democracy. While the FCC's vote to implement strong net neutrality rules was an important victory for American consumers and business, it also demonstrated the overwhelming power of grassroots activism and civic participation. In 2014, millions of Americans from across the political spectrum organized to ensure that their voices were heard, and—in the process—they redefined civic engagement in our country. But that kind of participation requires an open internet. Because of net neutrality, people from across the nation can connect with each other, share their ideas on the internet, and organize a community effort.

It has been suggested by some that without the Open Internet Order, enforcement of the nation's antitrust laws would be sufficient in preventing anticompetitive and unfair practices by the ISPs, but this argument ignores the distinct differences between regulators' antitrust authority and the objectives of the Open Internet Order. Net neutrality is not just about maintaining a fair

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[5] In the Matter of Preserving the Open Internet Broadband Indus. Practices, 25 F.C.C.R 17905, 17947 (2010), *vacated by Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[6] *See Verizon v. FCC*, 740 F.3d at 646 (regarding accepting fees from edge providers, the court highlighted that Verizon's counsel at oral argument stated "but for [the Open Internet Order] rules we would be exploring those commercial arrangements.").

marketplace for commerce—it's also about preserving a free and open marketplace for ideas. Antitrust enforcement in the United States has thus far been largely limited to preventing economic harms to competitors and consumers, but strong net neutrality rules would also ensure that the internet remains an open platform where all citizens have unimpeded access to diverse sources of information and can meaningfully engage in public discourse—objectives that serve the broader public interest. Furthermore, antitrust enforcement proceeds on a case-by-case basis and only after harms to competitors and consumers have already occurred. In contrast, the FCC's strong net neutrality rules proactively preserve the internet as an open platform for free speech and civic participation.

In response to my January letter urging the FCC to protect freedom of speech by maintaining the Open Internet Order, Chairman Pai wrote that "[w]e share the same goals of promoting a free and open Internet and protecting fully Americans' rights under the First Amendment to the U.S. Constitution."[7] I once again urge the Commission to demonstrate its commitment to those goals by maintaining the Open Internet Order in full.

Two and a half years ago, this Commission made a comprehensive case for establishing strong net neutrality rules, and millions of Americans voiced their support of those rules. The FCC is now weighing the rare decision for which the easier choice is also the right one—the FCC must maintain and fully enforce the important, court-tested rules that are already in place. I urge you to respect the political process and the voices that made themselves so abundantly clear in 2014.

As always, thank you for your consideration of my request.

Sincerely,

Al Franken
United States Senator

[7] Letter from Ajit V. Pai, Chairman, FCC to Senator Al Franken, United States Senate (Feb. 8, 2017) https://apps.fcc.gov/edocs_public/attachmatch/DOC-343543A1.pdf.